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90-14699

NO. 90-1469

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

WILLIAM H. HERNSTADT and JUDITH HERNSTADT,

Petitioners,

v.

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

HENRY MARK HOLZER and
HALL, O'BRIEN AND SACK, P.A.
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Attorneys for Petitioners

QUESTION PRESENTED

Does federal procedural due process allow a state trial court on remand, without an evidentiary hearing, to enter judgment on a counterclaim that had not been adjudicated at the initial trial and not briefed, argued or decided on appeal?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 3

JURISDICTION 5

CONSTITUTIONAL PROVISION INVOLVED 5

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 16

APPENDIX . . . . . (1)

TABLE OF AUTHORITIES

Bouie v. City of Columbia,
378 U.S. 347 (1964) 12

Brickell Bay Club Condominium v. Hernstadt,
512 So.2d 994 (Fla. 3d DCA 1987) . . . 3

Cole v. Arkansas,
333 U.S. 196 (1948) 13, 16

Dothard v. Rawlinson,
433 U.S. 321 (1977) 11

Facet Ent. v. NLRB,
907 F.2d 963 (10th Cir. 1990) . . . 11

Hernstadt v. Brickell Bay Club Condominium,
560 So.2d 1227 (Fla. 3d
DCA 1990) 2, 3, 9

NLRB v. Pepsi-Cola Bottling Co. of Topeka,
Inc.,
613 F.2d 267 (10th Cir. 1980) . . . 11

Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626 (1985) 15

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

WILLIAM H. HERNSTADT and JUDITH HERNSTADT,

Petitioners,

v.

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

Petitioners, William H. Hernstadt and Judith Hernstadt, request that a Writ of Certiorari issue to review the order of the District Court of Appeal of the Third District of Florida issued on April 3, 1990, rehearing

denied June 4, 1990, reported as Hernstadt v. Brickell Bay Club Condominium, 560 So.2d 1227 (Fla. 3d DCA 1990). That order affirmed the trial court's entry of judgment on remand in favor of defendant on its counterclaim which had neither been adjudicated in the original trial nor briefed or argued in, or decided by, the Third District Court of Appeal. (Discretionary review was denied by the Supreme Court of Florida in an order dated November 16, 1990).

OPINIONS BELOW

In granting judgment for plaintiffs on their complaint based on a real estate dispute, the original trial court made findings of fact and conclusions of law, but rendered no reported opinion in conjunction with its final judgment. On an appeal from the substantive real estate issue decided by the trial court, the Third District Court of Appeal rendered a written opinion which is published as Brickell Bay Club Condominium v. Hernstadt, 512 So.2d 994 (Fla. 3d DCA 1987). The remand trial court's unreported opinion, granting defendant judgment on its counterclaim, is set forth hereto as Appendix "A". The Third District Court of Appeal's opinion affirming the remand court and rejecting Petitioner's due process challenge, is reported as Hernstadt v. Brickell Bay Club

Condominium, 560 So.2d 1227 (Fla. 3d DCA 1990).

JURISDICTION

As stated above, discretionary review of the Third District Court of Appeal order of April 3, 1990 was denied by the Supreme Court of Florida on November 16, 1990. This Court has jurisdiction of this Petition pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

There is but one federal Constitutional provision involved: the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Although the question presented by this Petition for a Writ of Certiorari is one of procedural due process deprivation by a state judicial system, the case began in the Florida trial court as a real estate dispute. Petitioners sought a declaratory judgment that Respondent was estopped to deny them the use of an existing air-conditioning structure located partially above the roof line, but connected to their condominium unit. Respondent counterclaimed, seeking removal of the structure, physical restoration of the roof, and money damages. The trial judge found that because Respondent was estopped, Petitioners were entitled to the exclusive use and occupancy of the roof structure. A judgment for Petitioners was duly entered. Under the circumstances, of course, no judgment was rendered for Respondent on its counterclaim.

Respondents appealed, disputing the trial court's finding that an estoppel existed. Respondent's briefs in the appellate court contained no mention of its counterclaim. Respondent's oral argument in the appellate court was silent concerning its counterclaim. It is fair to say that in the Third District Court of Appeal Respondent had abandoned its counterclaim. Thus, it was no surprise that the appellate panel's reversal had nothing to say about Respondent's counterclaim and only addressed the trial judge's estoppel finding:

> [Petitioners] contend that the failure of [Respondent] to at least attempt affirmatively to prevent the renovations justifies application of waiver and estoppel principles. We disagree. (512 So.2d at 996).

Accordingly, the appellate court remanded with instructions "to enter judgment for [Respondent]." Id. at 997.

Petitioners then unsuccessfully sought discretionary review in the Supreme Court of Florida.

The proceedings then returned to the remand trial court where Respondents asked a different trial judge to enter a judgment not only dismissing Petitioner's complaint, but also "entering judgment on [Respondent's] counterclaim."

Without any evidentiary proceedings, the new remand trial court obliged. Judgment was entered on Respondent's counterclaim. It directed Petitioners to remove the roof structure and to restore the roof, and it awarded money damages. Petitioners' request for rehearing in the new remand trial court was denied.

Petitioners then appealed to the Third District Court of Appeal. They argued that since Respondents' counterclaim had not been

adjudicated in the trial court initially, or briefed, argued or decided in the appellate court, that court's remand instruction -- "enter judgment for [Respondent]" -- could have meant only that the remand court was to enter a judgment for Respondent dismissing Petitioners' complaint. For the appellate court to instruct the remand court to enter a judgment on Respondent's non-adjudicated, non-briefed, non-argued, non-decided counterclaim, Petitioners argued, would violate their federal procedural due process rights.

The Third District Court of Appeal disagreed, finding the "contention [to be] without merit." Hernstadt, supra, 560 So.2d 1227, 1228.

Petitioners sought discretionary review in the Supreme Court of Florida, which was denied.

REASONS FOR GRANTING THE WRIT

The facts of this case are not disputed. A bench trial in a real estate dispute ended in a judgment for Petitioners because Respondent was found estopped. Respondent's counterclaim was not adjudicated. On appeal, Respondent neither briefed nor argued its counterclaim. The appellate court thus did not adjudicate Respondent's counterclaim. It did, however, find that estoppel was inapplicable, and reversed and remanded. The remand court entered judgment dismissing Petitioners' complaint. That court also entered judgment in favor of Respondent on its counterclaim. No evidentiary hearing of any kind was held.

These facts give rise to an important question (stated above) implicating the relationship between state trial court control of civil litigation and the requirements of

federal procedural due process concerned with notice and an opportunity to be heard.

That question, actually and potentially affecting all civil litigation, has not been directly addressed by this Court in the form that it arises in this case.

There are, of course, a line of NLRB "switched theory" cases where the courts of appeals have held that procedural due process is violated when the Board makes a decision on grounds not considered and/or adjudicated at lower agency levels. (See, e.g., NLRB v. Pepsi-Cola Bottling Co. of Topeka, Inc., 613 F.2d 267 (10th Cir. 1980); Facet Ent. v. NLRB, 907 F.2d 963 (10th Cir. 1990).[1]

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[1] A corollary of the principle represented by the NLRB cases is that, as this Court observed in Dothard v. Rawlinson, 433 U.S. 321 (1977), reviewing courts are not ordinarily justified in relying on arguments that were not made in the trial court and preserved for appellate review. If this be true, it is difficult to understand how, consistent with the requirements of federal

On the state side, two of this Court's cases underscore the importance of the question presented here.

Although the facts of this case differ from those in Bouie v. City of Columbia, 378 U.S. 347 (1964), the principle which underlies Bouie would seem to be applicable here. In Bouie, appellate action had unacceptable retroactive consequences. Here, the remand trial court entered a judgment on a previously non-adjudicated counterclaim. If the unifying principle is judicial conduct (at any level) which deprives a litigant of notice and opportunity to be heard concerning a potential loss of property, Bouie would suggest that its focus on appellate action should be equally applicable to trial action. In principle, it

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procedural due process, a remand trial court can render judgment on a counterclaim which was not adjudicated at the initial trial and neither briefed, argued nor decided on the appeal.

would appear irrelevant whether the judicial action which deprives procedural due process is solely appellate, as in Bouie, or whether a remand trial court accomplishes the same result by enlarging on an appellate decision. Either way, the impact on the litigant, and the deprivation, is the same.

Cole v. Arkansas, 333 U.S. 196 (1948) -- although a criminal case, and one where the procedural due process deprivation occurred on appeal, rather than on remand -- is nevertheless instructive. There, the question was whether Petitioner was denied procedural due process when his conviction was affirmed under a criminal statute whose violation he had not been charged with. In words which could just as easily apply to the situation presented in the instant case, this Court observed that it is as much a violation of procedural due process for a defendant to be

sent to prison based on a charge on which he was not tried, as it would be to convict him on a charge that was never made. One could say that it is as much a violation of procedural due process for a civil litigant to be saddled with a judgment based on a non-adjudicated, non-briefed, non-argued, non-decided counterclaim, as it would be to enter a judgment against that litigant on a counterclaim that was never pleaded.

Yet the former situation is exactly the one which occurred in the Florida remand trial court here. Surely, when Petitioners left the Third District Court of Appeal they had every right to believe that they also left behind Respondent's apparently abandoned counterclaim. Yet the remand court obviously thought otherwise, giving rise to the question which Petitioners ask this Court to review. As Petitioners noted above, that question --

"Does federal procedural due process allow a state trial court on remand, without an evidentiary hearing, to enter judgment on a counterclaim that had not been adjudicated at the initial trial and not briefed, argued or decided on appeal?" -- implicates the relationship between state trial court control of civil litigation and the requirements of federal due process concerned with notice and opportunity to be heard.[2]

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[2] Although in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), this Court rejected the disciplined lawyer's argument that "the theory relied on by the [disciplinary board and then the Ohio Supreme Court] as to how the advertisement was deceptive was different from the theory asserted by the Office of Disciplinary Counsel in its complaint." (471 U.S. at 654), the underlying rationale for the Zauderer decision cuts the other way here. What appeared significant to the Zauderer Court was "that the Board's recommendations put [Zauderer] on notice of the charges he had to answer to the satisfaction of the Supreme Court of Ohio [the ultimate disciplinary authority]." (471 U.S. at 654). The same was not true here: not until Petitioners were in the remand trial court did they again encounter Respondent's

CONCLUSION

Wherefore, Petitioners respectfully request that this Honorable Court issue a Writ

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counterclaim, which no one had addressed in any manner whatsoever since the initial pleadings -- not in the original trial judgment, not in the decision. Here, whether or not the remand trial court's entry of judgment on Respondent's abandoned counterclaim was comparable to the Zauderer Disciplinary Board's "surprise exercise of judicial notice" to which Justices Brennan and Marshall objected (471 U.S. at 672), surely Petitioners were surprised when, in the new remand trial court, Respondent's long-gone counterclaim suddenly reappeared. Their position there was as untenable as Mr. Zauderer's when he reached the Ohio Supreme Court. As Justice Brennan said: "All that Zauderer could do was to argue that the Board's report was grounded on a theory that he had never been notified of and that he never had an opportunity to challenge...." (471 U.S. at 672). Here, all that Petitioners could do in the remand trial court -- even if they had fully known what was about to happen concerning the counterclaim -- was to argue that it was not fair. To paraphrase Justice Brennan, the mere opportunity unsuccessfully to bring such a procedural violation to the attention of the tribunal about to visit it on Petitioners did not provide them with the meaningful "chance to be heard" on the counterclaim. (471 U.S. at 473, fn. 21, citing Cole v. Arkansas, 333 U.S. 196 (1948).

of Certiorari to review the order of the District Court of Appeal of the Third District of Florida.

HENRY MARK HOLZER, ESQ.
and
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By: _____
GARY B. SACK, ESQ.
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Counsel for
Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail this 12th day of February, 1991 to Paul A. Louis, Esq., Sinclair, Louis, Segal, et al., 1125 Alfred I. Dupont Building, 169 E. Flagler Street, Miami, FL 33131 and Jeffrey D.

Rubinstein, Esq., Sun Bank Building, Suite 708, 777 Brickell Avenue, Miami, FL 33131.

HALL, O'BRIEN AND SACK, P.A.
1428 Brickell Avenue
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Miami, Florida 33131
(305) 374-5030

By: _____
GARY B. SACK

4017A311.PET

APPENDIX

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 82-7186 CA 18

WILLIAM HERNSTADT and JUDITH HERNSTADT, his wife,	)
Plaintiffs/Counter-Defendants,	)
vs.	)
BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,	)
Defendants/Counter-Plaintiffs.	)

FINAL JUDGMENT ON MANDATE

THIS CAUSE having come before the Court on the 22nd day of September, 1988 on the Motion for Entry of Final Judgment on Mandate of Defendant/Counter-Plaintiff, BRICKELL BAY CONDOMINIUM ASSOCIATION, INC., and this Court having heard argument of counsel for the respective parties and being otherwise duly and fully advised in the premises, it is

ORDERED AND ADJUDGED:

1. That the Final Judgment entered 6 February, 1985 be and the same is hereby vacated except paragraphs 2 and 4 thereof which, as modified, are incorporated herein.

2. That the relief sought by Plaintiffs/Counter-Defendants in their complaint be and the same is hereby denied.

3. That the relief sought by Defendant/Counter-Plaintiff in its Counterclaim be and the same is hereby granted and WILLIAM HERNSTADT AND JUDITH HERNSTADT shall henceforth cease and desist from using the roof structure which was the subject matter of this action as part of their living quarters and remove any and all furnishings, equipment and appurtenances thereto (except their air-conditioning equipment) and shall forthwith restore said roof structure and

ceiling to its previous state and condition at their own cost and expense.

4. BRICKELL BAY CONDOMINIUM ASSOCIATION, INC. be and is hereby awarded compensation for the use of the roof structure by WILLIAM HERNSTADT AND JUDITH HERNSTADT retroactive to the date of purchase of Terrace Suite A by WILLIAM HERNSTADT and JUDITH HERNSTADT and the Court reserves jurisdiction to determine the amount of same.

5. BRICKELL BAY CONDOMINIUM ASSOCIATION, INC. be and is hereby awarded and shall have, receive and recover against the WILLIAM HERNSTADT AND JUDITH HERNSTADT the sum of $5,114.90 for unpaid assessments against Terrace Suite A through and including the month of May, 1984, for which sum let execution issue, and the HERNSTADTS shall pay all proper assessments accruing after May 1984.

6. The Court reserves jurisdiction over this cause to determine the amount of attorneys' fees and costs to be awarded to BRICKELL BAY CONDOMINIUM ASSOCIATION, INC. against WILLIAM HERNSTADT AND JUDITH HERNSTADT for services rendered in the trial court, appeal to the Third District Court of Appeals and for resisting the petition for discretionary review in the Supreme Court of Florida, and further reserves jurisdiction to enforce all the provisions hereof.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 22nd day of September, 1988.

/s/ Robert H. Newman
CIRCUIT COURT JUDGE

Copies Furnished To:
Jeffrey D. Rubinstein, Esq.
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
Sinclair, Louis, Siegel, Heath,
Nussbaum & Zavertnik, P.A.
4017A311.PET

90-1469

(2)

Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

WILLIAM H. HERNSTADT and JUDITH HERNSTADT,

Petitioners,

v.

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

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TABLE OF CONTENTS

	Page
Table of Contents	ii
Table of Authorities	iii
Opinion of District Court of Appeal of the Third District of Florida filed August 18, 1987 reported as Brickell Bay Club Condominium Association, Inc. v. Hernstadt, 512 So.2d 994 (Fla. 3d DCA 1987)	1
Order denying motion for rehearing dated October 7, 1987	14
Opinion of District Court of Appeal of the Third District of Florida filed April 3, 1990 reported as Hernstadt v. Brickell Bay Club Condominium Association, Inc., 560 So.2d 1227 (Fla. 3d DCA 1990)	16
Order denying motion for rehearing dated June 4, 1990	22
Order of Supreme Court of Florida denying discretionary review	24

TABLE OF AUTHORITIES

Cases

Chattel Shipping and Investment, Inc. v. Brickell Place Condominium Ass'n, Inc., 481 So.2d 29 (Fla. 3d DCA 1985) 8

City of Miami Beach v. Arthree, 300 So.2d 65 (Fla. 3d DCA 1973) . . . 20

Confederation Life Ass'n v. Conte, 254 So.2d 45 (Fla. 3d DCA 1971), quashed on other grounds, 272 So.2d 130, cert. denied, 410 U.S. 959, 35 L.Ed.2d 693, 93 S.Ct. 1422 8

Constellation Condominium Ass'n. v. Harrington, 467 So.2d 378 (Fla. 2d DCA 1985) 8

Ennis v. Warm Mineral Springs, Inc., 203 So.2d 514, 520 (Fla. 2d DCA 1967), cert. denied, 210 So.2d 870 (Fla. 1968) 10

Fernandez v. Vasquez, 397 So.2d 1171, 1174 (Fla. 3d DCA 1981) 11

Fifty-Six Sixty Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 1979) 10

Fifty-Six Sixty Collins Ave. Condominium v. Dawson, 354 So.2d 432 (Fla. 3d DCA 1978) . . . 10

Fountains of Palm Beach Condo., Inc. No. 5 v. Farkas, 355 So.2d 163 (Fla. 4th DCA 1978) . 7, 9

Knowles v. Henderson,
156 Fla. 31, 22 So.2d 384, 386 (Fla. 1945) 12

Ladner v. Plaza Del Prado Condominium Ass'n.,
423 So.2d 927 (Fla. 3d 1982) 8

McAllister Enterprise Inc. v. McAllister Hotel, Inc.,
219 So.2d 114 (Fla. 3d DCA 1969) 8

Pepe v. Whispering Sands Condominium Association,
351 So.2d 755 (Fla. 2d DCA 1977) 7

Plaza Del Prado Condominium Association v. Richman,
345 So.2d 851 (Fla. 3d DCA 1977) . . . 10

Schmeck v. Sea Oats Condo. Ass'n, Inc.,
441 So.2d 1092 (Fla. 5th DCA 1983) . . . 8

State ex rel. Schwartz v. City of Hialeah,
156 So.2d 675 (Fla. 3d DCA 1963) 7

Constitutions

Article V, Section 3(b),
Florida Constitution (1980) 24

Statutes

Section 718.303(1),
Florida Statutes (1985) 6

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1987

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC., **

Appellant/Cross-Appellee, **

vs. CASE NO. 85-589 **

WILLIAM HERNSTADT and JUDITH HERNSTADT, his wife, **

Appellees/Cross-Appellants. **

Opinion filed August 18, 1987.

An Appeal from the Circuit Court for Dade County, Phillip W. Knight, Judge.

Carlton, Fields, Ward, Emmanuel, Smith & Cutler and Alan C. Sundberg and Sylvia Walbolt (Tallahassee), for Appellant/Cross-Appellee.

Hall, O'Brien and Cohen and Richard F. O'Brien, III, for Appellee/Cross-Appellant.

Before HUBBART, NESBITT and FERGUSON, JJ.

PER CURIAM.

Brickell Bay Condominium Association, Inc. appeals from a judgment in favor of the Hernstadts, unit owners, in a dispute over ownership of a roof structure in a condominium building.

The Hernstadts converted a structure located on the roof of the building, adjacent to their unit, into a bathroom and bedroom to be used for servant quarters as part of their unit. The structure, which was not included in the original plans, was added during the construction of the building for the sole purpose of housing air conditioning equipment for a restaurant and club located in the unit now owned by the Hernstadts.[1] Conversion of the structure was commenced by the Hernstadts

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[1] Ninety percent of the structure is situated over common elements of the building and 10 percent is located over the Hernstadt's unit.

without obtaining the Association's prior written approval as is required by the Declaration of Condominium.

It was not disputed that the Association gave the Hernstadts formal notice, before they closed on the purchase of their units, that the air conditioning room was not part of their unit. It is also agreed that the Association did not give approval to the Hernstadts' proposed renovation of the roof structure. In fact, the Hernstadts' proposed plan was specifically disapproved by the Association's engineers before the renovations began. After renovations of the structure had commenced, and in connection with a lawsuit filed by the Hernstadts regarding a leaky roof, the Association, through its attorney, advised the Hernstadts:

> [T]he structure over [the Hernstadts' unit] is the property of the association and your client is trespassing.

The renovations continued, in conjunction with renovations within the Hernstadts' own unit, for some nine months. During that time, the parties were still attempting to resolve the dispute over the Hernstadts' right to use the structure. Two months after the work was completed the Association demanded that the Hernstadts discontinue use of the air conditioning room unless 75 percent of the owners gave the required consent.

On a separate point the facts show that the Association refused to amend the Declaration of Condominium to provide for the completed division of the Hernstadts' Terrace Suite "A" into two smaller residential units. The Hernstadts complained that failure to amend the Declaration, as had been agreed to, prevented a sale of one of the units to a prospective purchaser. It was uncontroverted, however, that the Association had repeatedly

offered to amend the Declaration to reflect the division of the Hernstadts' unit into two apartments so long as the amendment did not include the disputed roof top structure. The Hernstadts refused to execute an amendment which did not recognize the air conditioning room as additional living space for their exclusive use and occupancy. Instead, they submitted to the Association a proposed amendment which provided:

> The Structure [the rooftop room] shall constitute a Limited Common Element and the HERNSTADTS, their successors and assigns, shall be entitled to the exclusive use and possession of the Structure....

A fourth proposed amendment submitted by the Hernstadts, which referred only to the Terrace Suite, was accompanied by a reservation of rights agreement as to the rooftop structure. The Association declined to execute the Hernstadts' proposed amendments or the reservation of rights agreement.

Adopting the arguments advanced by the Hernstadts, the trial court entered a Final Judgment ordering

> 1. The Hernstadts be and are hereby awarded the exclusive use and occupancy of the structure over the Terrace A...which they have converted to be an integral part of the living area...and the Association is estopped to deny them such exclusive use and occupancy.
>
> 3. The Hernstadts be and are hereby awarded damages against the Association attributable to the loss of the contract for sale of the smaller apartment made out-of Terrace A....

The Hernstadts contend that the failure of the Association to at least attempt affirmatively to prevent the renovations justifies application of waiver and estoppel principles. We disagree.

A Declaration of Condominium is a requirement of section 718.303(1), Florida Statutes (1985), for the governance of relationships between condominium unit owners

and the condominium association. The Declaration of Condominium, observed the court in Pepe v. Whispering Sands Condominium Association, 351 So.2d 755 (Fla. 2d DCA 1977),

> is more than a mere contract spelling out mutual rights and obligations of the parties thereto--it assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of real property.

A Declaration of Condominium is strictly construed to preclude any use not explicitly authorized by the Declaration. Fountains of Palm Beach Condo., Inc. No. 5 v. Farkas, 355 So.2d 163 (Fla. 4th DCA 1978).

A starting point in this review of the law of waiver and estoppel is the authorities which hold that the estoppel principle generally has no application to transactions which are forbidden by statute or ordinance or which are contrary to public policy. State ex rel. Schwartz v. City of Hialeah, 156 So.2d

675 (Fla. 3d DCA 1963); Confederation Life Ass'n v. Conte, 254 So.2d 45 (Fla. 3d DCA 1971), quashed on other grounds, 272 So.2d 130, cert. denied, 410 U.S. 959, 35 L.Ed.2d 693, 93 S.Ct. 1422. Estoppel is an equitable doctrine which is applied only where to refuse its application would be virtually to sanction the perpetration of a fraud. McAllister Enterprise Inc. v. McAllister Hotel, Inc., 219 So.2d 114 (Fla. 3d DCA 1969).

The courts of this state have uniformly refused to apply estoppel principles to permit alterations of condominium property without written permission of the Association. Schmeck v. Sea Oats Condo. Ass'n, Inc., 441 So.2d 1092 (Fla. 5th DCA 1983); Ladner v. Plaza Del Prado Condominium Ass'n., 423 So.2d 927 (Fla. 3d 1982); Chattel Shipping and Investment, Inc. v. Brickell Place Condominium Ass'n, Inc., 481 So.2d 29 (Fla. 3d DCA 1985); Constellation

Condominium Ass'n. v. Harrington, 467 So.2d 378 (Fla. 2d DCA 1985). In Fountains of Palm Beach Condominium, Inc. No. 5 v. Farkas, supra, the court rejected the same argument presented here that the failure of the Association to object to the unit owner's intent to alter the common elements should operate as an estoppel or waiver. Instead it held:

> Neither...the noncommittal, though apparently rather favorable, attitude of the management firm [could] be said to have justified any belief by the owner that she could safely ignore the requirement of the Declaration of Condominium that she obtain the prior written consent of both management and the association before altering the common elements.

355 So.2d at 164.

The cases relied upon by the appellee are not applicable as they applied estoppel principles where the unit owner had relied upon affirmative acts of the Association

permitting alterations to the common elements or where the association's previous non-enforcement of its rules had led other unit owners to act in reliance on a continuation of that policy. Fifty-Six Sixty Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 1979); Fifty-Six Sixty Collins Ave. Condominium v. Dawson, 354 So.2d 432 (Fla. 3d DCA 1978); Plaza Del Prado Condominium Association v. Richman, 345 So.2d 851 (Fla. 3d DCA 1977).

The Declaration of Condominium in this case required written approval by the Association for an alteration to the common elements. The Hernstadts were aware of the requirement before they started renovating the roof structure. Under Florida law no estoppel by silence can arise unless the party asserting the estoppel claim is ignorant of the truth. Ennis v. Warm Mineral Springs, Inc., 203 So.2d 514, 520 (Fla. 2d DCA 1967),

cert. denied, 210 So.2d 870 (Fla. 1968). There are no factors presented which justify application of waiver and estoppel principles.

The evidence does not support the Hernstadts' contention that the Association's refusal to amend the Declaration of Condominium, to reflect a division of their unit into two smaller units, caused a failure of the sale of one of their units. It was the Hernstadts' refusal to execute an agreement pertaining only to the subdivision of Terrace Suite A which frustrated the sale. The Association had no obligation to enter into any agreements regarding the disputed roof structure.

An established principle of law is that a party's good faith cooperation is an implied condition precedent to performance of a contract. Fernandez v. Vasquez, 397 So.2d 1171, 1174 (Fla. 3d DCA 1981). Cooperation of

the Hernstadts was a prerequisite to an amendment of the Declaration of Condominium to reflect the subdivision of their unit. One who prevents the performance of a contractual condition precedent cannot avail himself of his own wrong by claiming damages owing to the other party's failure to perform as promised. Knowles v. Henderson, 156 Fla. 31, 22 So.2d 384, 386 (Fla. 1945). Any damages suffered by the Hernstadts from a failed sale of one of their units was not the fault of the Association.

Four of the five points raised by cross-appeal are mooted by the rulings on the main appeal. The remaining point, whether the court committed error in failing to award damages to the Hernstadts for roof leaks, window leaks and water damage, is without merit. The Hernstadts' own witnesses could not say that the damages were not the same as

those for which recovery was obtained in an earlier lawsuit.

The judgment for the Hernstadts is reversed and the cause is remanded with instructions to enter judgment for the Association; the cross-appeal is affirmed.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1987

WEDNESDAY, OCTOBER 7, 1987

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC., **

Appellant/Cross-Appellee, **

vs. CASE NO. 85-589 **

WILLIAM HERNSTADT and JUDITH HERNSTADT, his wife, **

Appellees/Cross-Appellants. **

Upon consideration, appellees/cross-appellants' motion for rehearing and clarification in conjunction with motion for rehearing en banc is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of Appeal, Third District

By /s/Evelyn A. Hillman
Deputy Clerk

cc: Alan C. Sunberg
Richard F. O'Brien, III

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1990

WILLIAM HERNSTADT and JUDITH HERNSTADT, **

Appellants, **

vs. CASE NO. 88-2583 **

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC., **

Appellee. **

Opinion filed April 3, 1990.

An Appeal from the Circuit Court for Dade County, Robert H. Newman, Judge.

Hall, Poller & O'Brien and Henry Mark Holzer, for Appellants.

Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik and Paul Siegel and Steven I. Weissman, for appellee.

Before BASKIN, COPE and LEVY, JJ.

PER CURIAM.

Appellants William and Judith Hernstadt appeal a final judgment entered in favor of Brickell Bay Club Condominium Association, Inc. The final judgment was entered after remand from an earlier appeal, Brickell Bay Club Condominium Association, Inc. v. Hernstadt, 512 So.2d 994 (Fla. 3d DCA 1987), review denied, 520 So.2d 584 (Fla. 1988). The Hernstadts contend that the trial court deviated from the mandate in the earlier appeal. We disagree and affirm.

The facts of the prior appeal are set forth in the earlier opinion and will not be repeated in detail here. In essence the Hernstadts converted a structure located on the roof of their condominium unit so that it could be used as part of their unit. The Association contended that the renovation had occurred without required approvals and

directed the Hernstadts to cease using the renovated area. The Hernstadts initiated a lawsuit which requested a declaratory judgment and other relief. The Association counterclaimed for a mandatory injunction requiring the Hernstadts to cease and desist from using the roof structure, damages, and other relief. The trial court ruled for the Hernstadts, ruling that the doctrine of estoppel prevented enforcement of certain provisions of the Declaration of Condominium. The trial court thus granted the declaratory judgment and also awarded damages to the Hernstadts, subject to setoffs in favor of the association for certain assessments pertaining to the condominium unit. The Association appealed the final judgment, and the Hernstadts cross-appealed several issues pertaining to the declaratory decree and damage awards.

Our court ruled that "[t]he judgment for the Hernstadts is reversed and the cause is remanded with instructions to enter judgment for the Association; the cross-appeal is affirmed." 512 So.2d at 997. On remand the trial court directed the Hernstadts to cease and desist from using the roof structure, reserved jurisdiction for a later award of damages, and again entered an award for unpaid assessments.

On this appeal, the Hernstadts contend that the direction "to enter judgment for the Association" only meant to enter judgment as to the Hernstadts' declaratory Judgment action, but not to enter judgment in favor of the Association on the counterclaim. That contention is without merit. This entire matter was the subject of a lengthy bench trial at the conclusion of which the trial judge granted most of the relief requested by

the Hernstadts, and denied most of the relief requested by the Association. The principal issue on appeal was whether the doctrines of waiver and estoppel operated to prevent the Association from enforcing the terms of the Declaration of Condominium. The phrase "enter judgment for the Association" was correctly interpreted by the trial court and its judgment is consistent with the mandate. See City of Miami Beach v. Arthree, 300 So.2d 65 (Fla. 3d DCA 1973).

The Hernstadts also contend that the proceedings on remand deprived them of due process of law. They assert that they had neither notice nor an opportunity to be heard with respect to, the relief granted the Association. The Hernstadts argue that they are entitled to a new trial on the counterclaim. We disagree. As already stated, the original trial judge conducted a bench

trial on the merits of the Hernstadts' and Association's claims. On direct appeal, our court determined that the defenses of waiver and estoppel were not available to the Hernstadts, and that, on the record as made, the Association was entitled to judgment. The new final judgment entered after remand is consistent with the relief requested by the Association in its counterclaim and is entirely consistent with both the opinion and mandate of this court. The Association filed a written motion for entry of final judgment on the mandate, which gave fair notice of the Association's position. The trial court heard argument of counsel and entered that judgment now under review. The procedure followed conforms to the requirements of the due process clause.

Affirmed.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1990

MONDAY, JUNE 4, 1990

WILLIAM HERNSTADT and JUDITH HERNSTADT,	**
	**
Appellants,	**
vs. CASE NO. 88-2583	**
BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,	**
Appellee.	**

Upon consideration, appellants' motion for rehearing and for clarification and motion for rehearing en banc is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By /s/Evelyn A. Hillman
Deputy Clerk

cc: Jeffrey D. Rubinstein
Richard F. O'Brien, III
Alan Sunberg
Paul A, Lewis

SUPREME COURT OF FLORIDA

FRIDAY, NOVEMBER 16, 1990

WILLIAM HERNSTADT, et al.,	*
	*
Petitioner,	*CASE NO. 76,301
	*
v.	*District Court
	*of Appeal, 3rd
	*District -
	*No. 88-2583
BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,	*
	*
	*
Respondent.	*
	*

****

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P.

9.330(d).

MCDONALD, Acting C.J., EHRLICH, BARKETT, GRIMES and KOGAN, JJ., concur

Respondent's Motion for Attorney Fees is granted and said attorney is allowed a fee of one thousand dollars ($1,000.00) for services in this Court, said sum to be paid to said attorney Petitioners after final disposition of this cause.

A True Copy

TEST:

Sid J. White
Clerk,
Supreme Court

BH
CC:Hon. Louis J. Spallone, Clerk
Hon. Robert H. Newman, Judge
Richard F. O'Brien, Esquire
Paul A. Louis, Esquire
Steven I. Weissman, Esquire
Jeffrey Rubinstein, Esquire

HENRY MARK HOLZER, ESQ.
and
HALL, O'BRIEN AND SACK, P.A.

By:_____
GARY B. SACK, ESQ.
1428 Brickell Avenue
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Counsel for
Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail this ____ day of March, 1991 to Paul A. Louis, Esq., Sinclair, Louis, Segal, et al., 1125 Alfred I. Dupont Building, 169 E. Flagler Street, Miami, FL 33131 and Jeffrey D. Rubinstein, Esq., Sun Bank Building, Suite 708, 777 Brickell Avenue, Miami, FL 33131.

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By:_____
GARY B. SACK

4017B151.APP

Supreme Court, U.S.
FILED
APR 12 1991
OFFICE OF THE CLERK

(3)

No. 90-1469

In The

Supreme Court of the United States

October Term, 1990

WILLIAM H. HERNSTADT AND JUDITH HERNSTADT,

Petitioners,

vs.

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Third District

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED[1]

Does federal procedural due process in a declaratory decree action prohibit a state trial court, after reversal of a judgment on appeal in favor of the Plaintiffs (Petitioners) with directions to enter judgment for the Defendant (Respondent), from entering a judgment on remand which declares the rights of the parties in favor of the Defendant (Respondent), without another evidentiary hearing when the issue had been the subject of a lengthy bench trial?

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[1] The Respondent restates the Question Presented because the Petitioner's statement of the question incorporates an inaccurate representation of the facts.

THE PARTIES

The Petitioners are William H. Hernstadt and Judith Hernstadt, who owned a condominium unit at Brickell Bay Club Condominium. Respondent is Brickell Bay Club Condominium Association, Inc. which is the condominium association that owns and operates the common elements of Brickell Bay Club Condominium in Dade County, Florida.

TABLE OF CONTENTS[2]

QUESTION PRESENTED i
THE PARTIES ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
COURT'S LACK OF JURISDICTION 1
STATEMENT OF CASE AND FACTS 3
ARGUMENT FOR DENYING THE WRIT 4
CONCLUSION 8

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[2] The Petitioners, William H. Hernstadt and Judith Hernstadt, the Plaintiffs below, will be referred to as Petitioners, and the Respondent, Brickell Bay Club Condominium Association, Inc., the Defendant below, will be referred to as the Respondent in this brief. The following symbols will be used:

"P" for Petition for Writ of Certiorari

"PA" for Petitioners' Appendix

"PSA" for Petitioners' Supplemental Appendix

"RA" for Respondent's Appendix

All emphasis is that of the Respondent unless otherwise indicated.

TABLE OF AUTHORITIES

Page

CASES

Bouie v. City of Columbia, 378 U.S. 347 (1964) 6

Cole v. Arkansas, 333 U.S. 196 (1948) 6

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 47 L.Ed.2d 668 (1976) 2

Facet Ent. v. NLRB, 907 F.2d 963 (10th Cir. 1980) 6

Gates v. Jacksonville, 278 So.2d 645 (Fla. 1st DCA 1973) 5

Hernstadt v. Brickell Bay Club Condominium Association, 512 So.2d 994 (Fla. 3d DCA 1987) 2, 3, 6

Hernstadt v. Brickell Bay Club Condominium Association, 560 So.2d 1227 (Fla. 3d DCA 1990) 2, 3, 6

Illinois v. Gates, 462 U.S. 213, 76 L.Ed.2d 527 (1983) 3

May v. Holley, 59 So.2d 636 (Fla. 1952) 5

NLRB v. Pepsi Cola Bottling Co. of Topeka, Inc., 613 F.2d 267 (10th Cir. 1980) 6

Smith v. Smith, 118 So.2d 204 (Fla. 1960) 6

Talcott, Jr. v. Central Bank, 220 So.2d 411 (Fla. 3d DCA 1969) 5

Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 391 (1981) ...2, 3

Zaudere v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 7

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS AND STATUTES

14th Amendment, United States Constitution 7

28 U.S.C. Section 1254(1) 1

28 U.S.C. Section 1257(a) 1, 3

Florida Statute, Section 86.011 4

RULES

Rule 14(h), Supreme Court Rules 1

COURT'S LACK OF JURISDICTION

Petitioners erroneously seek to invoke the jurisdiction of this Court under 28 U.S.C. Section 1254(1). The Judgment on which review is sought is not that of any United States Court of Appeals, but is rather a judgment which was affirmed by a Florida District Court of Appeal and which the Supreme Court of Florida refused to review under its discretionary jurisdiction. Therefore, if this Court's jurisdiction is invoked, it must be under 28 U.S.C. Section 1257(a).

Even under Section 28 U.S.C. Section 1257(a) the petition should be denied because it disregards and violates Rule 14(h), Supreme Court Rules. Rule 14(h) applies where review of a judgment of a state court is sought and specifically requires:

> (h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Petitioners have failed to provide this required information in their jurisdictional brief.

Although Petitioners had ample opportunity in the trial court, for example, at oral argument, in their memorandum of law and in their petition for rehearing, they failed to timely and properly raise or preserve the federal issue of deprivation of due process of law under the 14th Amendment to the United States Constitution in the trial court. Thus, the petition is entirely defective both as to substance and form insofar as Petitioners' failure to comply with Rule 14(h). *Webb v. Webb*, 451 U.S. 493, 68 L.Ed. 2d 392 (1981). As a rule, the Court will not grant certiorari to decide an issue that was not raised in the proceedings below. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 47 L.Ed.2d 668 (1976).

This Court also lacks jurisdiction because it does not appear on the face of the record that the highest state court ruled on a federal issue.[3] Petitioners raised the due process issue for the first time before the state appellate court and did so under both the Florida and United States Constitutions. Although the face of the opinion on which review is sought mentions "due process" (PSA 21), it cannot be determined whether the state court ruled under

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[3] Petitioners omitted from their original appendix the inextricably bound predecessor opinion involving the same parties and subject matter, *"Hernstadt I,"* 512 So.2d 994 (Fla. 3d DCA 1987) (PSA 1). Likewise the Petitioners failed to include in their initial appendix the opinion which they seek to have reviewed, to wit: *Hernstadt v. Brickell Bay Club Condominium Association*, 560 So.2d 1227 (Fla. 3d DCA 1990) hereinafter *Hernstadt II*, (PSA 16). These omissions, belatedly corrected upon demand of the Clerk of this Court by the filing of Petitioners' Supplemental Appendix, are telling because Petitioners have grossly misrepresented the facts and nature of the opinion they seek to have this Court review.

the federal or state constitutional provisions. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed. 2d 527 (1983); *Webb v. Webb, supra*. It is respectfully submitted that the Petition should be denied since the Petitioners have totally failed to properly raise or even demonstrate a federal issue upon which this Court can exercise its discretionary jurisdiction under 28 U.S.C. Section 1257(a).

STATEMENT OF THE CASE AND FACTS

The very first sentence in *Hernstadt I*, 512 So.2d 994 (Fla. 3d DCA 1987) summarizes the essence of the controversy between the parties, which was tried extensively in a lengthy bench trial, as (PSA 2):

> . . . a dispute over ownership of a roof structure in a condominium building.

In the first appeal, *Hernstadt I*, the Florida District Court of Appeals reversed the trial judge's decision in favor of the Hernstadts and found the disputed roof structure to be part of the condominium common elements – not owned by the Hernstadts (PSA 10):

> The Declaration of Condominium in this case required written approval by the Association for an alteration to the common elements. The Hernstadts were aware of the requirement before they started renovating the roof structure.

The court then remanded the cause for entry of judgment on its mandate. Thereafter the trial court entered its judgment on the mandate and the Petitioner again appealed contesting the order implementing the mandate from the decision in *Hernstadt I*.

In the opinion on which review is sought, *Hernstadt II* 560 So.2d 1227 (Fla.3d DCA 1990), the Florida District Court of Appeals affirmed the final judgment entered upon its remand in *Hernstadt I*, finding that the trial court had correctly interpreted its first opinion. The trial court simply declared the rights of the respective parties as to the roof structure and enforced those rights by requiring, *inter alia*, the Petitioners to vacate the roof structure. The Petitioners now speciously complain because the declaration of rights they sought in their complaint was ultimately declared adverse to them.

ARGUMENT FOR DENYING THE WRIT

As noted in *Hernstadt II*, the Petitioners are the parties who filed suit for declaratory decree concerning their rights to the roof structure and Respondent counterclaimed (PSA 18):

> The Hernstadts initiated a lawsuit which requested declaratory judgment and other relief. The Association counterclaimed for a mandatory injunction requiring the Hernstadts to cease and desist from using the roof structure, damages and other relief.

The mere fact that the opinion in *Hernstadt I*, which was incorporated in the final judgment on the mandate entered by the trial court on remand, was adverse to the Petitioners, does not mean they were denied due process of law. Florida Statute Section 86.011 provides, inter alia:

> The court may render declaratory judgments on the *existence or non-existence* . . . of any right . . .

The Petitioners' Complaint below requested the trial court *"declare the rights of the parties with respect to the structure, and award relief sufficient to enforce said rights"* (RA 1). On remand the trial court entered a judgment on the mandate of *Hernstadt I* declaring rights and awarding relief in favor of Respondent. As stated by the Supreme Court of Florida in *May v. Holley*, 59 So.2d 636 (Fla. 1952):

> The fact that the declaration must be against the interest of the complaining party, and equity may require that costs be charged against him does not destroy the right to the declaration. If the standards stated above are met the plaintiff is entitled to have the existence or nonexistence of his rights adjudicated. 59 So.2d at 639.

In *Talcott, Jr. v. Central Bank*, 220 So.2d 411 (Fla. 3d DCA 1969) the Third District Court of Appeal noted:

> The possibility [or even probability] that the proper interpretation of the agreement in question would result in an adverse decree to the plaintiffs does not preclude their right to a declaratory decree. 220 So.2d at 413.

Also see *Gates v. Jacksonville*, 278 So.2d 645 (Fla. 1st DCA 1973).

Contrary to what actually occurred, Petitioners portray this declaration of rights and enforcement thereof as if it were the granting of some unrelated counterclaim without notice or hearing. Although the final judgment on the mandate (PA 1) is phrased as the granting of relief sought by Respondent in its counterclaim (i.e., requiring Petitioners to vacate the roof structure), this cannot reasonably be characterized as: " . . . a judgment on Respondent's non-adjudicated, non-briefed, non-argued, non-decided counterclaim . . . " (P 9). As noted by the

Supreme Court of Florida in *Smith v. Smith*, 118 So.2d 204 at 205 (Fla. 1960):

> When a final decree . . . is reversed without specific directions to enter a particular decree or order, the effect of the reversal is to remand the cause to the lower court for the entry of a further decree consistent with the ruling of this Court.

All that occurred in *Hernstadt II*, which is the case *sub judice*, is a ruling that on remand the trial court entered a final judgment that was consistent with the appellate court's own prior ruling in *Hernstadt I*. In fact the same appellate court on the second appeal acknowledged that the trial court had indeed entered a judgment which was consistent with its prior mandate.

There is not the slightest connection between the cases cited by Petitioner and the facts of the present case. Petitioners' first two cases are what they characterize as " . . . a line of NLRB switched theory cases" (P 11). *NLRB v. Pepsi-Cola Bottling Co. of Topeka, Inc.*, 613 F.2d 267 (10th Cir. 1980); *Facet Ent. v. NLRB*, 907 F.2d 963 (10th Cir. 1990). The opinion on which review is sought, *Hernstadt II*, does not involve any "switched theory" but is merely a determination by the Florida District Court of Appeal that the final judgment entered upon remand from *Hernstadt I*, correctly interpreted its initial opinion and mandate by setting forth the rights of the respective parties as to the roof structure.

Petitioners also cite the following two cases involving one form or another of "switched theory." In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), there was a retroactive application of a criminal statute and in *Cole v. Arkansas*,

333 U.S. 196 (1948) conviction of a defendant under a criminal statute different than the one under which the defendant was charged. Both of these cases are so far afield from the facts of the opinion on which review is sought herein that discussion of the obvious differences is not warranted.

Finally, Petitioners cite the case of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) in their footnote 2. In *Zauderer*, this Court rejected a disciplined lawyer's argument that "the theory relied on by the [disciplinary board and then the Ohio Supreme Court] as to how the advertisement was deceptive was different from the theory asserted by the Office of Disciplinary Counsel in its complaint." 471 U.S. at 654. In *Zauderer*, this Court held: " . . . the Board's recommendations put [Zauderer] on notice of the charges he had to answer . . . " 471 U.S. 654. In the instant case, not only were Petitioners fully on notice of the relief sought by Respondent, Petitioners themselves asked for that very relief, to wit: a declaration of rights as to the disputed roof structure and enforcement thereof (PSA 18 and RA 1). Petitioner's complaint sought a declaratory decree (RA 1). Petitioners got exactly what they sought – a declaratory decree – but it was adverse to them. Petitioners now take the preposterous position that an appellate court cannot implement its previous mandate and by doing so it deprived them of due process under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The Petition for a Writ of Certiorari should be denied as frivolous and Respondent moves for the assessment against Petitioners of attorneys' fees and/or such other sanctions as the court deems appropriate.

Respectfully submitted,

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[4] Counsel of record.

INDEX TO APPENDIX

Page

Excerpts of Second Amended Complaint Hernstadt II.....RA 1-2

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 82-7186 (CA 25)

WILLIAM HERNSTADT and JUDITH HERNSTADT, his wife,

Plaintiffs,

vs.

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION,

Defendant.

SECOND AMENDED COMPLAINT

Plaintiffs, WILLIAM HERNSTADT and JUDITH HERNSTADT, his wife, through undersigned counsel, sue Defendant, BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC., a Florida Not-for-Profit Corporation, and state:

* * *

COUNT II

22. This is an action for equitable relief, declaratory judgment and damages.

* * *

30. Defendants have caused doubt as to Plaintiff's rights in connection with the said structure, and Plaintiffs hereby seek a declaration of their rights from this Court.

WHEREFORE, Plaintiffs pray that this Court award the following relief:

(a) Declare that the structure shall continue to be a part of Terrace Suite A as divided, and to remain over the larger unit therefor for the exclusive use of the owners thereof;

(b) Alternatively, declare that the structure is an appurtenance to Terrace Suite A in accordance with Florida Statute §718.109;

(c) Alternatively, declare that the Plaintiffs have the right to an exclusive easement in the structure;

(d) Alternatively, declare that the superstructure is a limited common element with its rights to exclusive use belonging to the Plaintiff;

(e) Further declare the rights of the parties with respect to the structure, and award relief sufficient to enforce said rights;

(f) Award a reasonable attorney's fee pursuant to §57.105 Florida Statutes;

(g) Award damages, interest, costs and such other and further relief as this Court deems just and proper.